

**OFFICIAL FILE**  
**ILLINOIS COMMERCE COMMISSION**

STATE OF ILLINOIS

**ORIGINAL**

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company )  
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Petition for expedited approval of implementation )  
of a market-based alternative tariff, to become ) Docket No. 00-0259  
effective on or before May 1, 2000, pursuant of )  
Article IX and Section 16-112 of the Public )  
Utilities Act )

**APPLICATION FOR REHEARING OF  
THE PEOPLE OF THE STATE OF ILLINOIS**

NOW COME the People of the State of Illinois, by James E. Ryan, Attorney General of the State of Illinois ("the People" or "AG") and respectfully request that pursuant to Section 10-113 of the Public Utilities Act, 220 ILCS 5/10-113 and 83 Ill.Adm.Code 200.880, the Illinois Commerce Commission ("Commission" or "ICC") reconsider and grant rehearing of its Order, entered on April 27, 2000, in ICC Docket No. 00-0259.

**I. The People incorporate by reference all previously briefed arguments.**

As a preliminary matter, the People incorporate by reference herein all arguments raised in their Comments, their Brief on Exceptions and Reply Brief on Exceptions.

**II. The Commission's decision to conduct expedited proceedings resulting in this Order violated the procedural due process requirements of the Public Utilities Act and the Illinois Administrative Procedures Act.**

The Commission's decision to adopt an expedited schedule denied parties' rights to a

hearing, cross-examination and an adequate chance to challenge ComEd's proposal, in violation of Sections 9-201, 10-101 and 10-103 of the Act and Sections 10-25 and 10-50(c) of the Illinois Administrative Procedure Act ("IAPA"). Pursuant to Sections 10-201(e)(iv)(C) and 10-201(e)(iv)(D), these errors render the Order subject to reversal by the Illinois Appellate Court. The Commission's scheduling decision precluded review of the facts necessary to fully consider this fundamental change to the nascent competitive electricity market. The result is that the Order is subject to reversal, pursuant to Section 10-201(e)(iv)(A), because it is not supported by substantial evidence. Without such evidence the Order cannot contain sufficient findings and analysis to allow an informed judicial review, and therefore is subject to remand, pursuant to Section 10-201(e)(iii).

**A. Procedural due process requirements of the Public Utilities Act and the Illinois Administrative Procedures Act.**

ComEd submitted the Rider PPO-MI, which proposed to change PPO<sup>1</sup> and CTC<sup>2</sup> rates, pursuant to Section 16-112(a) of the Act which incorporates by reference Article IX of the Act. Rate changes require the Commission to either allow a tariff to become effective or hold a hearing to determine whether the rate change is "just and reasonable." See 220 ILCS 5/9-201. Under the Act, hearings must be held in accordance with the requirements of the IAPA. 220 ILCS 5/10-101. Section 10-25 of the IAPA requires all parties in a contested case<sup>3</sup> to be afforded

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<sup>1</sup>Power Purchase Option. 220 ILCS 5/16-110.

<sup>2</sup>Customer Transition Charge. 220 ILCS 5/16-108(f).

<sup>3</sup>The instant proceeding is a contested case, as conceded by both the Commission and ComEd itself when the Commission requested that parties consider waiving the application of the Commission's *ex parte* rules and ComEd requested that all parties stipulate to the waiver.

an opportunity for a hearing, to respond to and present evidence and argument. This proceeding is a contested case:

“Contested case” means an adjudicatory proceeding (not including a ratemaking, rulemaking, or quasi-legislative, informational, or similar proceeding) in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.

5 ILCS 100/1-30.

Complaint cases initiated pursuant to any Section of this Act, investigative proceedings and ratemaking cases shall be considered “contested cases” as defined in Section 3.02 (100/1-30) of the Illinois Administrative Procedure Act, any contrary provision therein notwithstanding.

220 ILCS 5/10-101.

The requirements of a “just and reasonable” hearing, pursuant to Section 9-201, meet the requirements of a contested case. 220 ILCS 5/9-201. Where the proceedings are not conducted in compliance with provisions of the IAPA, the order shall be void. 5 ILCS 100/10-50(c).

These statutory requirements are also necessary under principals of procedural due process. See People ex rel. The Illinois Commerce Commission v. Operator Communications, Inc., d/b/a/ Oncor Communications, Inc., 281 Ill. App. 3d 297, 666 N.E. 2d 830, 834 (1996) (“Administrative proceedings must conform to the requirements of due process of law”); see also Balmoral Racing Club, Inc. v. The Illinois Racing Board, 151 Ill. 2d 367, 603 N.E.2d 489, 506 (1992) (minimal guarantees of procedural due process include reasonable notice, the right to examine witnesses, to present witnesses, and to receive a fair and impartial hearing). Indeed, the

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See Edison Stipulation of the Parties (proposed), April 7, 2000. The Commission’s *ex parte* rules only apply in contested cases. See 83 Ill. Adm. Code 200.710. The IAPA also prohibits all *ex parte* communications after notice of hearing in a contested case is served. See 5 ILCS 100/10-60. It is only within a contested case that there would be any cause to stipulate to the waiver of *ex parte* rules. Therefore, this proceeding is a contested case.

Commission has stated that the opportunity for discovery, use of expert witnesses, unrestricted cross-examination, and initial and reply briefs protects the due process rights of the parties before it. See Commonwealth Edison Company, Ill. C. C. Dkt. 87-0043, (July 16, 1987), 84 PUR 4<sup>th</sup> 469, 494 (citing the procedures of the Public Utilities Act).

Despite these statutory protections, none of these due process elements were afforded to the parties of this case.

**B. The schedule of the instant Docket violated statutory procedural due process requirements.**

This docket's unusual and unprecedented schedule, set by the Hearing Examiner's Scheduling Ruling ("HESR"), provided no opportunity for a hearing, did not permit parties to cross-examine ComEd's witnesses or even to learn of other witness testimony<sup>4</sup> in time to respond prior to the Hearing Examiner's Proposed Order ("HEPO") being issued. HESR at 1.

**1. The schedule failed to provide for a hearing.**

The HESR made no allowance for a hearing, rather the HESR limited the parties to 5 days in which to draft written comments and submit expert testimony. This short period resulted in a *de facto* denial of the right to produce witnesses. The only parties able to produce testimony were ComEd, those parties solicited by ComEd to support Rider PPO-MI and the Commission Staff, who, unlike the intervenors, have in-house experts that could be rallied to produce a

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<sup>4</sup>The Illinois Supreme Court concluded that "[m]anifestly there is no hearing when the party does not know what evidence is offered or considered, and *is not given an opportunity to test, explain or refute.*" See Balmoral Racing Club, Inc., et al. v. Illinois Racing Board et al., 151 Ill.2d 367, 404, 603 N.E.2d 489, 505 (1992), citing Interstate Commerce Comm'n. v. Louisville & Nashville R.R. Co., 227 U.S. 88 (1913) (emphasis added by Balmoral).

modicum of testimony. No other party<sup>5</sup> had enough time to submit adequate expert testimony.

The Order is subject to reversal on three separate grounds for failing to provide a hearing and the opportunity to present evidence. First, Section 10-25 of the IAPA requires the Commission to hold a hearing and allow parties to present evidence. 5 ILCS 100/10-25. Where the proceedings, which give rise to an order, violate the Act or any other State or federal constitution or law to the prejudice of the appellant<sup>6</sup> the order shall be reversed on appeal. 220 ILCS 5/10-201(e)(iv)(C). The proceedings in this case violated Section 10-25 by not including a hearing or allowing parties to submit testimony, thereby prejudicing the due process rights of all Illinois electricity users effected by this Order. Therefore, pursuant to Section 10-201(e)(iv)(C) of the Act, this Order is subject to reversal on appeal.

Second, the Order is void pursuant to Section 10-50(c) of the IAPA, because the proceedings were not conducted in compliance with the provisions of the IAPA. 5 ILCS 100/10-50(c). Pursuant to Section 10-201(e)(iv)(D), any Commission order that violates the Act or any other State or federal law or constitution shall be reversed on appeal. 220 ILCS 5/10-201(e)(iv)(D). The Order directly violates the Section 10-50(c) of the IAPA. Therefore, pursuant to Section 10-201(e)(iv)(D), the Order is subject to reversal on appeal.

Third, where a Commission proceeding does not follow statutory requirements to provide for “notice, a hearing, the presentation of evidence and findings of fact, the Commission

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<sup>5</sup>The IIEC mustered a mere 4 pages of testimony in the short time allowed.

<sup>6</sup>Pursuant to Section 205/6.5 of the Attorney General Act, the Attorney General “shall be a party as a matter of right to all proceedings, investigations, and related matters involving the provision of electric services before the Illinois Commerce Commission,” and represents the interests of all Illinois citizens, classes of customers and users of electrical services. 15 ILCS 205/6.5(c,d).

loses its jurisdiction to act and any order entered by the Commission under such circumstances is void.” Commonwealth Edison v. Illinois Commerce Comm’n, 180 Ill. App. 3d 899, 536 N.E.2d 724, 731(1988), citing American National Bank & Trust Co. v. Pennsylvania R.R. Co., 52 Ill. App. 2d 406, 431-32, 202 N.E.2d 79 (1966), aff’d, 35 Ill.2d 145, 219 N.E.2d 529 (1967). Pursuant to Section 10-201(e)(iv)(B) of the Act, any order made outside of the jurisdiction of the Commission shall be reversed on appeal. 220 ILCS 5/10-201(e)(iv)(B). Therefore, pursuant to Section 10-201(e)(iv)(B), this Order is subject to reversal on appeal.

**2. The schedule failed to provide cross-examination of witnesses.**

The HESR did not allow parties to cross-examine any expert witnesses. In fact, the HESR did not provide any forum, in which parties could plumb the veracity of any witness’ expert testimony.

Section 10-25 of the IAPA requires the Commission to allow parties to respond to evidence. 5 ILCS 100/10-25. The proceedings in this case violated Section 10-25, and therefore, pursuant to Section 10-201(e)(iv)(C) of the Act, this Order is subject to reversal on appeal. 220 ILCS 5/10-201(e)(iv)(C).

The Order is void pursuant to Section 10-50(c) of the IAPA, because the proceedings were not conducted in compliance with the provisions of the IAPA. 5 ILCS 100/10-50(c). The Order directly violates the Section 10-50(c) of the IAPA. Therefore, pursuant to Section 10-201(e)(iv)(D), the Order is subject to reversal on appeal. 220 ILCS 5/10-201(e)(iv)(D).

Pursuant to Section 200.615 of the Commission’s Rules of Practice, all parties, the Staff and the Hearing Examiner must stipulate to a waiver of any rights that they have to cross-examination. 83 Ill.Adm.Code 200.615. Absent such a waiver, cross-examination must be

provided. The Commission did not obtain, nor did it in fact seek, such a waiver. An Order which violates the Commission's own rules shall also be reversed on appeal. See Business and Professional People for the Public Interest, 136 Ill.2d 192, 228, 555 N.E.2d 693, 709 (1990) ("BPI"). There was no waiver of party rights to cross-examination. Therefore, the Order is subject to reversal on appeal.

**3. The schedule provided no opportunity for parties to respond to evidence filed with comments.**

The HESR required parties to submit simultaneous comments, accompanied by any verified statements. HESR at 1. No rebuttal statements were permitted. Not only were parties denied their rights to cross-examine any witness, but in fact were denied a chance to respond to all witnesses and evidence prior to the issuance of the HEPO.

The Illinois Supreme Court concluded that "[m]anifestly there is no hearing when the party does not know what evidence is offered or considered, and *is not given an opportunity to test, explain or refute.*" See Balmoral Racing Club, Inc., et al. v. Illinois Racing Board et al., 151 Ill.2d 367, 404, 603 N.E.2d 489, 505 (1992), citing Interstate Commerce Comm'n. v. Louisville & Nashville R.R. Co., 227 U.S. 88 (1913) (emphasis added by Balmoral). Therefore, for the same reasons as stated in section 1. above, the Order shall be reversed on appeal.

**C. The unauthorized "paper hearing" of this Docket, resulting in this Order, violated Section 200.525 of the Commission's Rules of Practice.**

The HESR set out a "paper hearing" without the express stipulation of all of the parties in violation of Section 200.525 of the Commission's Rules of Practice. 83 Ill.Adm.Code

200.525(a). Section 200.525 allows parties to waive their due process right to a full hearing, including the introduction and cross-examination of evidence and testimony,<sup>7</sup> if all parties, the Staff and the Hearing Examiner stipulate to a waiver of any rights that they have to such a hearing. Id. In a “paper hearing” all material issues are resolved on the basis of written pleadings and submissions verified by affidavit. Id. There is no opportunity for a hearing or cross-examination of witnesses.

The HESR provided for comments on Edison’s petition which could include expert opinions or evidentiary assertions, if supported by affidavit. HESR at 1. As such, the HESR set out a “paper hearing”. It did not provide for a hearing, cross-examination or the opportunity to comment on or reply to all testimony and evidence prior to issuance of the HEPO. Rather, the HESR unilaterally, in contravention of the Commission’s own rules, decided that only a “paper hearing” would be held. Neither, the HESR or the Order makes any mention of these waiver requirements, or in any way defends its rejection of the parties’ rights to a hearing.

The unauthorized<sup>8</sup> paper hearing sanctioned by the Commission is inappropriate for the nature of this case and seriously tramples the due process rights of the parties, in violation of the IAPA and the Act. Consequently, this proceeding cannot (and, in fact, did not) result in any findings that the rates filed under ComEd’s proposed Rider PPO-MI tariffs are “just and reasonable.” Hence, rates under those tariffs cannot subsequently be found “just and reasonable” as part of ComEd’s wholesale offer.

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<sup>7</sup>In addition to Section 200.525, the Commission Rules specifically state in Section 200.615 that cross-examination must also be waived in the same manner as set out to allow a “paper hearing”. 83 Ill.Adm.Code 200.615.

<sup>8</sup> Under the Commission’s Rules of Practice, paper hearings may be held only when all parties, the Staff and the Hearing Examiner assent. 83 Ill.Adm. Code 200.525.



As a decision generated contrary to the requirements of the Act, the Order is not the product of proper deliberation of the proposal on the merits of the case. Therefore, under Section 10-50(c) of the IAPA, the Order is void and pursuant to Section 10-201(e)(iv)(D), is subject to reversal on appeal

**D. The Order did not provide sufficient findings or analysis for a appellate court to conduct an informed review.**

The Commission addressed a similar market value alternative tariff proposal from ComEd in 1999. See generally Order: Commonwealth Edison Company Petition for Appeal of an Alternative Methodology for Calculation Market Values, Docket No. 99-0171 (August 24, 1999). In that Docket, the Commission conducted a thorough evidentiary hearing to consider ComEd's proposal for a market-based index tariff before ultimately rejecting it as not sufficiently representative of the market. Id.

Commission orders must "provide 'findings and analysis sufficient to allow an informed judicial review', [and] the Commission must set forth more reasoning and analysis than would be acceptable from a circuit court." Citizens Utility Board v. Illinois Commerce Commission, 291 Ill. App. 3d 300, 310, 683 N.E.2d 938, 947 (1997) ("CUB III"), quoting 220 ILCS 5/10-201(e)(iii), citing Citizen's Utility Board v. Illinois Commerce Commission, 166 Ill. 2d 111, 120-126, 651 N.E.2d 1089 (1995) ("CUB I"). Where the findings and analysis are not sufficient the Act requires the reviewing court to remand the order back to the Commission. 220 ILCS 5/10-201 (e)(iii).

"[W]hen [Commission decisions] drastically depart from past practice" the "decisions are entitled to less deference" from the reviewing court. BPI, 136 Ill.2d at 228, 555 N.E.2d at 709,

citing Commonwealth Edison, 180 Ill. App. 3d at 908, 536 N.E.2d at 730. Given the fact that, just last year, the Commission conducted a full hearing to evaluate ComEd's proposed market-based index tariff, there is no credible reason to dispense with a similar proceeding in this docket. Such a drastic departure from the Commission's original approach to this issue requires the Commission to grant rehearing on this case to avoid the more stringent appellate review advocated by the BPI court. Id.

The proceeding of an administrative hearings must be conducted in a manner appropriate to the nature of the issues being considered. Lakeland Construction Co. v. Department of Revenue, 62 Ill.App. 3d 1036, 379 N.E.2d 859 (1978). This Docket will fundamentally change the nascent competitive electricity market. Therefore, the Commission should grant rehearing to properly conduct the instant proceeding consistent with the Act, IAPA and the Commission's Rules.

**III. The Order fails to issue a finding that ComEd's proposed Rider PPO-MI rate change is "just and reasonable" pursuant to the requirements of Section 9-201(c) of the Public Utility Act.**

ComEd submitted the Rider PPO-MI, which proposed to change PPO and CTC rates, pursuant to Section 16-112(a) of the Act which incorporates by reference Article IX of the Act. Rate changes require the Commission to either allow a tariff to become effective<sup>9</sup> or hold a hearing to determine whether it should approve of the rate change as "just and reasonable." See 220 ILCS 5/9-201. Pursuant to Section 9-201(c), the Commission can only "approve" tariffs

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<sup>9</sup>Where the Commission allows the tariffs go into effect and no hearing is held, no finding need be made by the Commission that the tariffs are "just and reasonable." See City of Galesburg v. Illinois Commerce Commission, 47 Ill.App.3d 499, 362 N.E.2d 78 (1977).

upon making a finding that rates under such tariffs are “just and reasonable.” 220 ILCS 5/9-201(c). An order<sup>10</sup> approving of a rate change must contain a finding that the rate change is “just and reasonable.” 220 ILCS 5/9-101; 220 ILCS 5/9-201(c). Such a finding that rates are “just and reasonable” cannot occur unless it is supported by evidence in the record. 220 ILCS 5/10-103, see also American National Bank & Trust Co. v. Pennsylvania R.R. Co., 52 Ill. App. 2d 406, 431, 202 N.E.2d 79, 92 (1966), aff’d, 35 Ill.2d 145, 219 N.E.2d 529 (1967) (findings of fact must be based on the evidence in the record); 220 ILCS 5/10-201(e)(iii).

In this case, the Commission failed to issue an order stating that it would not suspend ComEd’s tariffs. Instead, it decided to approve or reject the tariff change, in effect exercising its discretion and conceding that a “just and reasonable” finding was needed. The Commission may only approve ComEd’s rate change by finding that ComEd has met its burden of proof of showing that the rate change is “just and reasonable.” See 220 ILCS 5/9-201(c). The Act contains no other manner by which a rate change may be approved by the Commission.

The rates contained in ComEd’s Rider PPO-MI tariffs, whether offered as part of a wholesale offering or independently, have not been found to be “just and reasonable” under the statutory requirements of the Act. While the Interim Order’s finding number (4.) utilizes the phrase “just and reasonable,” a careful reading of the language indicates that all the Interim Order found “just and reasonable” was its own proposed modifications to ComEd’s Rider PPO-MI. Order p.34. Therefore, the Interim Order violates Section 9-201 of the Act and pursuant to Section 10-201(e)(iv)(C) is subject to reversal on appeal.

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<sup>10</sup>The order must meet the procedural requirements of Section 10-101, incorporating Section 10-25 of the IAPA, or it will be void pursuant to Section 10-50(c) of the IAPA.

**IV. Even if the Order is held to have found the Rider PPO-MI tariff “just and reasonable,” the Order violated Section 9-201(c) of the Act, because ComEd did not meet its burden of proof.**

Pursuant to Section 9-201(c) of the Act, the utility seeking to change its rates has the burden of proving that the proposed rate change is “just and reasonable.” 220 ILCS 5/9-201(c). In order for the utility to meet its burden of proving that its rate change is “just and reasonable” for ratepayers, the utility must present sufficient evidence concerning the impact of the rate change on those ratepayers. See Citizens Utility Board v. Illinois Commerce Commission, 276 Ill. App. 3d 730, 738-39, 658 N.E.2d 1194, 1201 (1995) (“CUB II”).

No actual “evidence” was entered into a record or tested in this case. Rather, the Commission collected ComEd’s petition and its accompanying statements from experts as well as the “comments” of the other parties and their experts prior to rendering a decision. Moreover, statements submitted by experts advocating a particular position, unaccompanied by substantial evidence to support their position, are insufficient to meet ComEd’s burden of proving the new rates are “just and reasonable”. An order which bases its findings on such statements violates Sections 10-201(e)(iv)(A) and 10-201(e)(iv)(C) as a violation of Section 9-201(c) of the Act. See Citizens Utility Board v. Illinois Commerce Commission, 166 Ill.2d 111, 651 N.E.2d 1089, 1097 (1995) (“CUB I”).

ComEd failed to provide anything more supportive of the Rider PPO-MI than a summary of the tariff changes, the tariff themselves and assertions by ComEd employees, without any supporting evidence. ComEd has not met its burden of proving that the new rates are “just and reasonable”. Therefore, the Order violates Section 9-201(c) of the Act, and pursuant to Section 10-201(e)(iv)(A) of the Act shall be reversed on appeal.

ComEd also relied upon the participation of some parties in “comprehensive workshops” held prior to this Docket as support for approval of its petition. Neither the minutes, workpapers or any other product of these workshops were entered into the record.

The Commission may only base its decisions, orders or findings on the record of decision. 220 ILCS 5/10-103. Record evidence is limited to that evidence received by or submitted to the hearing examiner. 5 ILCS 100/10-35. Where a Commission order considers information not in the record, the order is not supported by “substantial evidence” and pursuant to Section 10-201(e)(iv)(A) shall be reversed on appeal. See BPI, 136 Ill.2d 192, 555 N.E.2d at 712 (Commission improperly relied on the circumstances of a settlement). 220 ILCS 5/10-201(e)(iv)(A).

To the extent that ComEd attempted to meet their burden of proof by referring to the workshops held prior to the filing of the petition and to the extent the Commission relied on these references to support its decision, ComEd has not met its burden of proving that its news rates are “just and reasonable” in violation of Section 9-201(c) of the Act, and, pursuant to 10-201(e)(iv)(C) and 10-201(e)(iv)(A) of the Act, is subject to reversal on appeal.

**V. The Order’s Conclusions Are Not Supported By Substantial Evidence, in Violation of Section 10-201(e)(iv)(A) of the Public Utilities Act.**

In order to issue a legally sustainable decision, Commission orders must contain findings supported by substantial evidence. 220 ILCS 10-201(e)(iv)(A). The Commission’s Order in the instant docket authorizes Edison to file Rider PPO-MI tariffs incorporating certain modifications proposed either by the parties or by the Commission itself. Order at 34. Since neither the tariffs nor the Commission’s modifications were ever introduced into a properly

constituted record as evidence, the Commission's decision to approve the proposed tariffs as modified is not supported by substantial evidence and is therefore subject to reversal.

Neither Edison's proposed tariff, the statements of Edison experts submitted to explain the proposal nor any of the suggested modifications was proffered as "evidence" in the legal sense<sup>11</sup> in this docket. Rather, the Commission directed that Edison's petition, expert statements and accompanying tariffs were to be treated as a subject for "comment" by the parties. Additionally, the modifications adopted by the Commission were not offered as "evidence".

Edison's submissions in this docket do not qualify as evidence. Evidence consists of testimony, business documents or other exhibits which have been vetted in a formal proceeding that properly allows for discovery and cross-examination of sponsoring witnesses who testify under oath. The Commission never conducted such a proceeding. Rather, it ordered an expedited procedure designed to implement Edison's requests in two weeks. This accelerated review did not provide the legally constituted "hearing" required by the Act and did not produce any proof that could be described as evidentiary in nature, despite the Commission's representations to the contrary. See 220 ILCS 5/9-201(c); 220 ILCS 5/10-101; 5 ILCS 100/10-25.

Nothing can be treated as evidence unless it has been introduced as such. Atchison, Topeka & Santa Fe Rwy. Company et al. v. Commerce Commission, 335 Ill. 624, 167 N.E. 831 (1927). (Commission findings must be based on evidence with an opportunity for all parties to

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<sup>11</sup> Black's Law Dictionary defines evidence as "[A]ny species of proof, or probative matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc. for the purpose of inducing belief in the minds of the court or jury as to their contention." Black's Law Dictionary, Fifth Edition (1979) (emphasis added).

cross-examine witnesses, inspect documents and offer evidence in rebuttal). The Order's reliance on Edison's submissions does not satisfy the legal requirements of the Public Utilities Act because the Commission may not arbitrarily choose or fabricate a position, but instead must come to a conclusion based upon the record in the case. BPI, 136 Ill.2d 192, 555 N.E.2d at 712. Without a lawful "hearing," no properly constituted record exists upon which the Commission can rely to support its findings.

Absent any lawful hearing and the substantive, legally presented proof such a hearing would produce, the Order's findings on Edison's Rider PPO-MI proposal and the Commission's modifications thereto are not supported by substantial evidence, in violation of Section 10-201(e)(iv)(A). Rehearing is therefore required.

**VI. The Order fails to support its finding of "good cause" to exempt the Rider PPO-MI from the 45-days notice required pursuant to Section 9-201(a) of the Public Utility Act.**

The Order allowed the Rider PPO-MI to go into effect in violation of the 45 days notice requirements of Section 9-201(a) of the Act. 220 ILCS 5/9-201(a). The Act allows the Commission to order<sup>12</sup> a tariff filing exempted from that notice requirement where the utility shows good cause for the exemption. Id.

**A. Finding of "good cause" is not supported by substantial evidence.**

ComEd provided no evidence to support its request for an exemption from the 45-day

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<sup>12</sup>Such a finding of "good cause" must be made in an order specifying the changes to be made, the time they shall take effect, and how they shall be filed and published. 220 ILCS 5/9-201(a).

notice requirement. Id. The only basis for allowing the exemption was ComEd's desire to have an effective tariff prior to the June 2000 billing cycle. Petition para. 8.

Pursuant to Section 10-201(e)(iv)(A), where the Commission's findings are "not supported by substantial evidence<sup>13</sup> based on the entire record of evidence," the order is subject to reversal on appeal. CUB I, 166 Ill. 2d at 132-133, citing 220 ILCS 5/10-201(e)(iv)(A).

Where a Commission order considers information outside the record, such order is not supported by substantial evidence, in violation of Section 10-201(e)(iv)(A). See BPI, 136 Ill.2d 192, 555 N.E.2d at 712 (analysis showed that the Commission used settlement data not in the record to choose a rate increase and then work backwards to support it with evidence); Allied Delivery System, Inc. v. Illinois Commerce Commission, 93 Ill. App. 3d 656, 668, 417 N.E.2d 777, 786 (1981) (order reversed, because it spoke in terms of conclusions without concrete factual support); BPI, 136 Ill.2d 192, 555 N.E.2d at 712; citing Hartigan v. Illinois Commerce Comm'n, 117 Ill.2d 120, 145, 510 N.E.2d 865 (1987) (Commission may not arbitrarily choose or fabricate a position in a docket, rather it must come to a conclusion based on the record).

The only other "evidence" that ComEd submitted to support its exemption was its unsubstantiated allegation that all interested parties had participated in workshops, and had participated in Docket No. 99-0171, an earlier proceeding which had addressed ComEd's 1999 attempt to pass a similar market index-based tariff. Petition para. 7. However, ComEd did not submit any evidence of the workshops into the record and the Order failed to take administrative

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<sup>13</sup>Substantial evidence has been defined as "evidence which a reasoning mind would accept as sufficient to support a particular conclusion and consists of more than a scintilla of evidence but may be somewhat less than a preponderance." City of Chicago v. Illinois Commerce Comm'n, 281 Ill. App. 3d 617, 622, 666 N.E.2d 1212, 1216 (1996), citing Metro Utility v. Illinois Commerce Comm'n, 193 Ill. App. 3d 178, 184, 549 N.E.2d 1327, 1330-31 (1990).



notice of any record of decision of Docket No. 99-0171. Where the Order considered Docket No. 99-0171 or the workshops, in finding “good cause” to exempt Rider PPO-MI from the 45-day notice requirement, the Order violates Section 10-201(e)(iv)(A), and may be reversed on appeal. 220 ILCS 5/10-201(e)(iv)(A).

Accordingly, the Commission may only consider ComEd’s request to expedite the tariff filing to meet the June 2000 billing period, which by itself, is not “substantial evidence” that “good cause”<sup>14</sup> exists to exempt Rider PPO-MI from the Section 9-201’s 45-day notice requirement. Therefore, the Order violates Section 10-201(e)(iv)(A), and may be reversed on appeal. 220 ILCS 5/10-201(e)(iv)(A).

**B. The Order provided no reasoning or analysis sufficient for an informed judicial review of its finding of “good cause” to exempt Rider PPO-MI from the 45-day notice requirement.**

There is no indication in the Order of any analysis regarding what is required to show “good cause”, or whether ComEd’s proposal satisfied those requirements. Several parties have argued that ComEd violated the Section 9-201 45-day notice provision and that the record had not shown sufficient “good cause” to justify an exemption. Order at 31. While, the Commission Conclusions section lists the intervenor party objections and arguments on this issue, there is no analysis regarding those concerns. Order at 30.

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<sup>14</sup> There was no separate order issued by the Commission, which met the requirements of Section 9-201(a). The Interim Order makes no mention of how the tariff changes shall be filed or published. Therefore, the Interim Order violates Section 9-201(a) of the Act and, pursuant to 10-201(e)(iv)(A), is subject to reversal on appeal. *See Illinois Power Company: Petition For Authority to Revise its Fuel Adjustment Clause on Less Than 45 Days’ Notice to Provide for a Minimum Credit on the Monthly Fuel Adjustment Charge to Customers During the Current Outage of Clinton Power Station*, No. R-18935, (September 29, 1997) (example of correct 9-201(a) Commission order exempting 45-day notice requirement).

Section 10-201(e)(iii) of the Act requires that Commission orders “provide ‘findings or analysis sufficient to allow an informed judicial review’, [and therefore,] the Commission must set forth more reasoning and analysis than would be acceptable from a circuit court.” CUB III, 291 Ill. App. 3d 300, 683 N.E.2d at 943, quoting 220 ILCS 5/10-201(e)(iii), citing CUB I, 166 Ill. 2d at 120-126, 651 N.E.2d 1089. The CUB III court held that where the Commission’s findings did not refer to any evidence adduced, it did not display sufficient reasoning or analysis to meet the standard articulated above. CUB III, 291 Ill. App. 3d 300, 683 N.E.2d at 946 (“remand is necessary so that the Commission can provide the appropriate evidentiary basis and reasoning for its findings”); Allied Delivery System, 93 Ill. App. 3d at 667, 417 N.E.2d at 787 (conjecture and speculation “is clearly an unsatisfactory and unacceptable basis for its decision.”)

After twice noting that the Commission’s ability to allow an abbreviated notice proceeding is usually balanced by the Commission’s ability to remedy any problems that go undiscovered in such a proceeding by modifying the tariff at a later date, the Order found “that there has been good cause shown to justify the Commission’s expedited treatment of the matter.” Order at 31. There is no discussion of what “good cause” consists of or what other circumstances have prompted the Commission to find “good cause” in the other cases hinted at in the Order. Id. The Order merely notes that requests for exemption from this 45-day notice requirement are “far from unheard of.” Id.

Since the Interim Order provided no analysis defining “good cause,” or explanation of what constituted “good cause” in the instant proceeding, the Order is subject to reversal on appeal under Section 10-201(e)(iii). 220 ILCS 5/10-201(e)(iii).

**VII. A Reviewing Court Need Not Defer to the Commission's Expertise on Ratemaking Issues If the Commission Fails to Properly Exercise Its Expert Judgment.**

Courts have traditionally deferred to the judgment of the Commission on issues requiring the agency's particular expertise or on decisions premised on complex scientific and technological evidence. When the Commission's judgment is based on its particularized expertise, that judgment is given significant weight on appeal. United Cities Gas Co. v. Illinois Commerce Comm'n. 163 Ill.2d 1, 12, 643 N.E.2d 719 (1994), citing Village of Apple River v. Illinois Commerce Comm'n., 18 Ill.2d 518, 523, 165 N.E.2d 329 (1960). It is well-established that courts will give great weight to Commission decisions precisely because its judgments are presumed to be "informed by experience." Apple River, 18 Ill.2d 523; Public Utilities Commission v. Springfield Gas and Electric Co., 291 Ill. 209.

Particularly with respect to the issue of setting rates for public utilities, Commission findings that a utility's rates are "just and reasonable" will be accepted by a reviewing court as *prima facie* correct and are entitled to significant weight due to the Commission's expertise in the field of utility ratemaking. Cerro Copper Products v. Illinois Commerce Comm'n., 83 Ill.2d 364, 370-71, 415 N.E.2d 345; Village of Apple River v. Illinois Commerce Comm'n., 18 Ill.2d 518, 523, 165 N.E.2d 329 (1980).

However, where an administrative agency declines to properly perform those tasks necessary to enable it to exercise its regulatory expertise, reviewing courts are deprived of the rationale upon which their deference is based. The Commission's decision to forego formal hearings and the compilation of an evidentiary properly constituted record in this case deprived the Commission of an opportunity to review the specialized testimony upon which its expertise is premised. Consequently, Commission conclusions with respect to Commonwealth Edison's

rates under Rider PPO-MI are not the product of the Commission's exercise of its expert judgment. Because they are not decisions "informed by experience" a reviewing court may hold that deference to the agency's findings is unjustified.

Judicial deference to administrative expertise is not unbounded. For example, if the agency's findings are against the manifest weight of the evidence, its decision must be reversed by the reviewing court. People ex rel. Hartigan v. Illinois Commerce Comm'n., 148 Ill.2d 348, 367, 592 N.E.2d 1066 (1992); BPI, 136 Ill.2d at 204, 555 N.E.2d 693. Where Commission findings are directly contrary to record evidence, its decision will be reversed. Brotherhood of Locomotive Firemen and Enginemen v. New York Cent. R. Co., 339 Ill. 201, 171 N.E. 148 (1930). In cases where Commission decisions are premised not on the deliberate and reasoned consideration of record evidence but on the designation of a party position as "the winner," courts will not defer to administrative expertise. BPI, 136 Ill.2d 192, 555 N.E.2d at 712, citing People ex. rel. Hartigan v. Illinois Commerce Comm'n., 117 Ill.2d 120, 145, 510 N.E.2d 865 (1987).

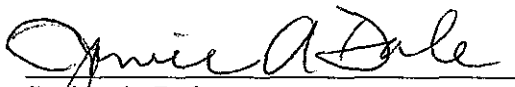
The Commission's role is not that of an arbitrator between the utility and other parties. Rather its role is that of an investigator and regulator responsible for "the setting of just rates for all affected by the rates." Citizens Utility Board v. Illinois Commerce Comm'n., 276 Ill.App.3d 730, 740, citing Hartigan, 117 Ill.2d at 135. In the instant case, the Commission designed a forum in which no substantive "investigation" by itself or by any other party was possible. Rather than affirmatively setting rates, as Section 9-201 of the Act requires, the Commission instead permitted a slightly modified version of Edison's proposed rates to go into effect without the active investigation upon which the public and the courts rely. Rehearing of this case is not only proper, it is required by law if the Commission's order is to survive judicial scrutiny.

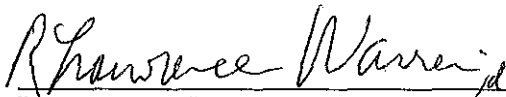
### VIII. CONCLUSION

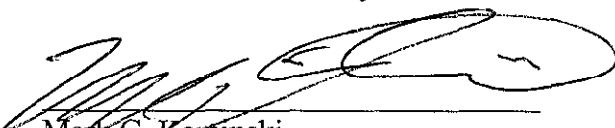
WHEREFORE, the People of the State of Illinois ex rel. James E. Ryan, Attorney General, respectfully request that the Commission grant rehearing and reconsideration of its April 27, 2000 order in Docket No. 00-0259 on the issues presented herein.

Respectfully submitted,

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State of Illinois

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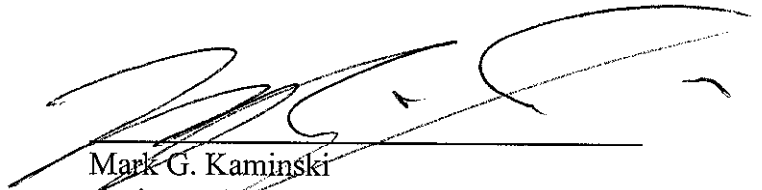
Public Utilities Bureau  
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Chicago, Illinois 60601  
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Dated: May 26, 2000

**VERIFICATION**

STATE OF ILLINOIS     )  
                                  )     SS  
COUNTY OF COOK     )

Mark G. Kaminski, being first duly sworn upon oath, deposes and states that he is an Assistant Attorney General, Office of the Attorney General State of Illinois; and that he has read the foregoing Application For Rehearing of The People of State of Illinois, ICC Docket No. 00-0259, and knows the contents thereof; and that to the best of his knowledge, information and belief, based upon reasonable inquiry, that said contents are true and correct.

  
\_\_\_\_\_  
Mark G. Kaminski  
Assistant Attorney General

SUBSCRIBED and SWORN to  
before me this 26<sup>th</sup> day of May, 2000.

  
\_\_\_\_\_  
NOTARY PUBLIC

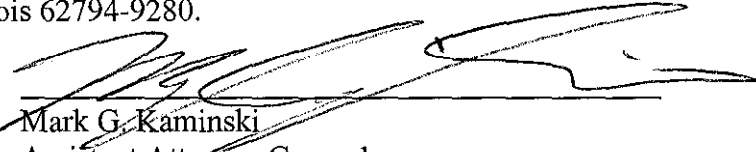


STATE OF THE ILLINOIS  
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	)	
	)	
Petition for expedited approval of	)	Docket No. 00-0259
implementation of a market-based	)	
alternative tariff, to become effective on or	)	
before May 1, 2000, pursuant of Article IX	)	
and Section 16-112 of the Public Utilities	)	
Act	)	

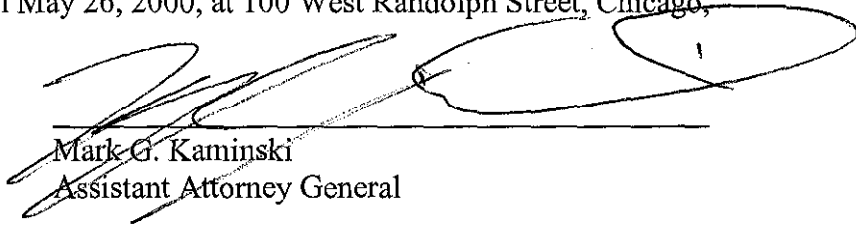
**NOTICE OF FILING**

PLEASE TAKE NOTICE that on this date, May 26, 2000, we have filed with the Chief Clerk of the Illinois Commerce Commission the enclosed Application For Rehearing of The People of The State of Illinois in the above-captioned docket by delivering it to United Parcel Service for next day delivery to Donna Caton, Chief Clerk of the Illinois Commerce Commission 527 East Capitol Avenue, Springfield, Illinois 62794-9280.

  
Mark G. Kaminski  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I, Mark G. Kaminski, Assistant Attorney General, hereby certify that I served above identified documents upon all active parties of record on the attached service list by United States Mail, first class postage prepaid on May 26, 2000, at 100 West Randolph Street, Chicago, Illinois 60601.

  
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